BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

GEORGE C. ROETS JR.	)	
Claimant	)	
VS.	)	
	)	Docket No. **1,058,765**
ESTES EXPRESS LINES	)	
Respondent	)	
AND	)	
	)	
NEW HAMPSHIRE INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier request review of the February 6, 2012, preliminary hearing Order entered by Administrative Law Judge (ALJ) Nelsonna Potts Barnes. Kenton D. Wirth of Wichita, Kansas, appeared for claimant. Brandon A. Lawson of Kansas City, Missouri, appeared for respondent and its insurance carrier (respondent).

The record on appeal is the same as that considered by the ALJ and consists of the preliminary hearing transcript, with exhibits, dated January 31, 2012 and all pleadings contained in the administrative file.

ISSUES

The ALJ found that on November 23, 2011, claimant was performing his regular job duties, which included moving freight and "pulling a pallet"; that claimant developed acute low back pain as a result of his work activity; that claimant established it is more probably true than not true claimant was injured working for respondent; and that claimant's injury arose out of and in the course of his employment. The ALJ also found that claimant was a credible witness and that the medical records corroborated claimant's allegation that his work activities were causally related to his injury. ALJ Barnes found that claimant's accident was the prevailing factor in causing claimant's back injury and need for medical treatment. The ALJ's preliminary hearing Order awarded claimant temporary total disability benefits (TTD) and medical compensation.

Respondent requests review of whether claimant sustained personal injury by accident arising out of and in the course of his employment with respondent. Respondent argues that claimant was injured at home on either Thursday, November 24, 2011, or on Saturday, November 26, 2011.

Claimant maintains the ALJ's findings are supported by a preponderance of the credible evidence and that the preliminary hearing Order should be affirmed.

Accordingly, the sole issue presented to the Board for review is whether the ALJ erred in finding claimant sustained personal injury by accident arising out of and in the course of his employment with respondent.

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

George Roets Jr. is age 53 and began working for respondent as a utility driver in March 2011. After a couple weeks claimant became a pick up and delivery (P & D) driver which required him to pick up and deliver freight. In addition to driving, claimant's job required lifting and moving freight both by hand and with a pallet jack.

On November 23, 2011, claimant alleged he suffered a work-related injury at a customer's facility. He was using a pallet jack to pick up a tote, which apparently consisted of palleted freight weighing about 3,000 pounds. Claimant had trouble moving the tote and struggled with it for about 10 minutes before someone arrived to assist him. While moving the tote, claimant noticed pain in his lower back. The alleged accident occurred near the end of his work day so claimant returned to respondent's terminal.

When claimant arrived at the terminal, he could not straighten up his back and he had "a real funny walk."[1] Keith Hare, another one of respondent's employees, was behind the counter. Claimant handed in his paperwork. Also present was Jason ("Jessie") Vaughn, a dispatcher for respondent. According to claimant, Mr. Vaughn looked at him "real funny"[2] with a questioning look. Claimant testified he told Jessie "I jacked my back up."[3] Claimant clocked out and went home.

After getting home from work, claimant rested on the couch due to his back pain. The next day, Thanksgiving, claimant remained on the couch. On Friday, November 25,

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[1] P.H. Trans. at 10.

[2] *Ibid*.

[3] *I*d. at 11.

2011, claimant sought medical treatment at the Newton Medical Center's emergency room. When claimant was seen in the hospital, he was experiencing symptoms consisting of an inability to urinate; back pain ranging from 7 to 10 on a 10-point scale; and numbness in the left lower extremity.

At Newton Medical Center, claimant was provided with a catheter, a lumbar CT scan, and pain medication. The CT scan revealed severe central canal stenosis with probable crowding of the cauda equina at L4-5. The CT scan also demonstrated, at the same level, severe left neural foraminal narrowing, with probable compression of the exiting L4 nerve root, mainly secondary to facet arthropathy, and moderate to severe right neural foraminal narrowing. Mild degenerative changes were also noted.

Claimant was instructed by the hospital personnel to follow-up on Monday, November 28, 2011, with Dr. Joseph Luinstra, claimant's primary care physician. On Saturday, November 26 and Sunday, November 27, 2011 claimant "[j]ust laid around."[4]

On November 28, 2011, claimant contacted respondent by telephone between 5 a.m. and 6 a.m. Claimant talked to Dana Caster, respondent's in-bound supervisor, and said he would not be in to work that day because of his back. At about 1:30 p.m. claimant was examined by Dr. Luinstra, who advised claimant to proceed to the hospital because emergency surgery was needed.

Claimant was admitted to Via Christi Medical Center on November 28, 2011. On November 29, 2011, Dr. Raymond Grundmeyer III, a neurosurgeon, performed surgery on claimant's lumbar spine. A lumbar MRI scan was conducted before the surgery and its findings mirrored those of the CT scan performed on November 25, 2011. The surgical procedure consisted of an L4-5 laminectomy with discectomy to decompress the nerve root. The operative report described free fragments of disc material on both the right and left side.

Claimant experienced low back pain approximately six years ago, which prompted him to consult with Dr. Luinstra on one occasion. Dr. Luinstra prescribed pain medication and exercises. Claimant testified his low back symptoms resolved after about six days. Claimant had no further problems with his low back until his alleged injury in this claim.

When he testified at the preliminary hearing, claimant continued to have problems urinating and controlling his bodily functions. He also experienced numbness in his back, difficulty walking and a tingling sensation in his left foot.

Claimant called respondent the day after his surgery, on November 30, 2011, and talked to Daryl Heinlein, respondent's terminal manager, about his back problem and

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[4] *Id*. at 16.

surgery. In that conversation, Mr. Heinlein mentioned something about paperwork, which claimant assumed was a reference to workers compensation paperwork. Claimant admitted that he did not tell Mr. Heinlein in that conversation about the alleged injury moving freight.

On December 6, 2011, claimant received a call from Mr. Heinlein. By that time, Mr. Heinlein had become aware that claimant was claiming a work-related injury. In the telephone conference, Mr. Heinlein confronted claimant about the matter. According to claimant, Mr. Heinlein accused claimant of previously telling Mr. Heinlein that claimant's injury occurred on a Saturday, an apparent reference to Saturday, November 26, 2011. Claimant denied he told Mr. Heinlein, or anyone else, that he had been injured on a Saturday.

Peggy Roets, claimant's wife, testified that claimant was okay on the morning of November 23, 2011, but that later that afternoon she saw him having difficulty walking and standing up straight. She also observed claimant dragging his left foot. She also testified that because of claimant's back pain he missed a November 24, 2011 Thanksgiving family gathering. Claimant continued to have symptoms and finally on Friday, November 25, 2011, Ms. Roets took claimant to the Newton Medical Center's emergency room.

Ms. Roets corroborated claimant's testimony that he advised the staff at the emergency room that he had hurt his back at work.

Jason "Jessie" Vaughan testified he did remember claimant returning to respondent's terminal from his route on November 23, 2011, however, claimant did not tell Mr. Vaughn that he had "jacked up his back." Mr. Vaughn denied that he noticed anything unusual about claimant's physical appearance or the way claimant was walking. However, Mr. Vaughn admitted that he "wasn't really paying attention to that. . . ."[5]

Daryl Heinlein, the terminal manager, testified that claimant called him around 9:30 or 10 a.m. on Monday, November 28, 2011. Claimant did not mention anything in his testimony about this conversation. According to Mr. Heinlein, claimant told him that he hurt his back at home on Saturday and would not be at work that day. Mr. Heinlein testified claimant mentioned nothing about the injury being work-related.

Mr. Heinlein did not recall the date of the call, but he was contacted by Abay Neuroscience Center (Dr. Grundmeyer's office) in which the doctor's office inquired about to whom their invoices should be forwarded for claimant's "work comp surgery."[6] Mr.

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[5] *Id*. at 48.

[6] *Id*. at 53.

Heinlein told Abay that there was no workers compensation claim. Mr. Heinlein then called claimant:

> Q. What did you do after that?
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> A. I called Mr. Roets.
>
> Q. And what did you tell him at that point in time?
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> A. I asked him when this became a workers comp injury because nobody knew anything about that and expressed my displeasure that we had this conflict.
>
> Q. What did he tell you?
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> A. That it was done at work, and that was really about as short as the conversation was. There was really no point in going further.
>
> Q. To your knowledge, prior to that conversation, had you heard from Mr. Roets or anybody for that matter that he was alleging this was a work injury?
>
> A. No.[7]

Medical records were admitted into evidence at the preliminary hearing, including records of Newton Medical Center dated November 25, 2011. Those records include the following references:

> 52 YO M presents to ED with complaint of left posterior hip pain that radiates down the back of his leg to his calf. Says pain started yesterday. Says pain is similar to pain he had when he had bulging disc in his lower back several years ago. Says both sides of his buttock feel numb and he has tingling in his left foot. Able to walk but says it causes him to have increased pain. Also says he has not been able to urinate since yesterday. Denies fever, chills, recent back injury/strain, or prostate problems. Patient does move freight for his job. Says he took one of wife's oxycodone this morning which decreased his pain. Pain worsens with movement.[8]
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> PT. PRESENTS TO ED WITH C/O PAIN IN HIS LT. HIP AND DOWN INTO HIS LEG THAT STARTED 11/23. STATES NOW HE HAS TINGLING IN HIS LT. LEG AND HIS ENTIRE BUTTOCKS FEELS NUMB. HAD A BACK INJURY YEARS AGO BUT NO RECENT RE INJURY. STATES HE HAS ALSO BEEN UNABLE TO URINATE. THE LAST TIME HE URINATED

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[7] *Id*. at 54.

[8] *Id*., Cl. Ex. 5 at 1.

> WAS YESTERDAY. DOES NOT FEEL PAIN IN HIS BLADDER AREA BUT STATES IT FEELS NUMB ALSO.[9] (Capital letters are in original.)

However, records from Abay Neuroscience Center dated December 13, 2011 indicate that claimant's injury was work-related and occurred on November 23, 2011.[10] The discharge summary, history and physical and operative report, all dated on either November 28 or November 29, 2011, contain histories fully consistent with claimant's testimony.[11]

PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-501b (b) and (c) provides:

> (b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.
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> (c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 44-508(h) provides:

> 'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2011 Supp. 44-508(d), (f) and (g) provides in pertinent part:

> (d) 'Accident' means an undesigned, sudden and unexpected traumatic event , usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the

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[9] *Id.*, Cl. Ex. 5 at 3. (Emphasis in original.)

[10] *Id.*, Cl. Ex. 3 at 1.

[11] *Id.*, Cl. Ex. 4 at 7, 9 and 11.

injury. 'Accident' shall in no case be construed to include repetitive trauma in any form.

> (f) (1) 'Personal injury' and 'injury' mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.
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> (2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.
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> (B) An injury by accident shall be deemed to arise out of employment only if:
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> (i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
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> (ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.
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> (3) (A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:
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> (i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;
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> (ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;
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> (iii) accident or injury which arose out of a risk personal to the worker; or
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> (iv) accident or injury which arose either directly or indirectly from idiopathic causes.
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> (g) 'Prevailing' as it relates to the term 'factor' means the primary factor, in relation to any other factor. In determining what constitutes the 'prevailing factor' in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

Whether an accident arises out of and in the course of employment is a question of fact.[12]

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[12] *Halford v. Nowak Const. Co.*, 39 Kan. App. 2d 935, 186 P.3d 206, rev. denied 287 Kan. 765 (2008).

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.[13] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[14]

ANALYSIS

The undersigned Board member agrees with the finding of the ALJ that claimant sustained personal injury by accident arising out of and in the course of his employment on Wednesday, November 23, 2011.

Claimant injured his lumbar spine when moving a tote with a pallet jack. Claimant's spouse corroborated claimant's testimony about the difference in his physical condition before and after claimant's work day on November 23. The testimony of claimant and Mr. Vaughn is inconsistent. Claimant says he told Mr. Vaughn when claimant returned to respondent's terminal that he jacked up his back. Claimant may have said nothing about his back to Mr. Vaughn. However, claimant may have told Mr. Vaughn that he jacked up his back but Mr. Vaughn was, as he admitted, not paying attention. It seems improbable that, assuming Mr. Vaughn was paying attention, he would not have noticed that claimant could not walk upright and was dragging one of his feet.

There is no description of any specific traumatic event, or series of repetitive traumas, in either the medical records or in the testimony, which could have caused claimant's injury other than the November 23, 2011 accident. Although claimant admitted he experienced back pain approximately six years before the November 23, 2011 event, the evidence is unrefuted that claimant recovered completely from that pain in less than a week and that claimant had no further low back problems until November 23, 2011.

The substantial symptoms claimant was experiencing on Thursday, Friday, Saturday, and Sunday, November 24, through November 27, 2011, and claimant's inactivity on those dates are undisputed and corroborated by claimant's spouse. Respondent would have the Board disregard the testimony of Ms. Roets because, (1) the fact of Ms. Roets' marriage to claimant impairs her credibility, and (2) Ms. Roets provided claimant one of her prescription pain pills on Friday, November 25, 2011. It would be just as improper to reject Ms. Roets' testimony solely because of her marriage to claimant than it would be to disregard the testimony of Mr. Vaughn and Mr. Heinlein solely because they are associated with respondent. The provision of one pain pill to ease her spouse's pain is irrelevant to the credibility of Ms. Roets' testimony.

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[13] K.S.A. 44-534a.

[14] K.S.A. 44-555c(k).

The testimony of Mr. Heinlein and claimant is largely consistent. Both witnesses' agree that they talked by telephone on at least three occasions after the date of the alleged injury. Both witnesses agree that claimant did not provide notice of the work-related injury to Mr. Heinlein until they spoke on or about December 6, 2011. It is noteworthy that respondent raises no argument that claimant failed to comply with the notice requirements of K.S.A. 2011 Supp. 44-520.

The testimony of claimant and Mr. Heinlein diverge regarding whether claimant was injured on Saturday, November 26, 2011. Mr. Heinlein's testimony on this issue is unreliable. The medical records dated November 25, 2011, from Newton Medical Center demonstrate that claimant's injury occurred before November 25, 2011. When claimant was seen in the ER that day he was experiencing low back pain ranging from 7 to 10 on a 10-point scale. Claimant was also experiencing bladder dysfunction, left lower extremity radicular pain, and numbness. Claimant's CT scan conducted on November 25, 2011, revealed serious injury to claimant's lumbar spine, including severe neurological compromise. The evidence in this record is inconsistent with an injury to claimant's low back on November 26, 2011. It is difficult to imagine claimant telling the terminal manager he hurt his back on Saturday, November 26th, given the severity of claimant's symptoms and the CT scan findings on November 25, 2011.

Respondent highlights the reference in the November 25, 2011 ER records that claimant's "pain started yesterday."[15] However, the same records correct that reference by indicating claimant's pain "STARTED 11/23."[16] Respondent also points out that the same ER records make no specific reference to claimant having hurt his back at work moving freight. However, the records do note that "[p]atient does move freight for his job."[17] Moreover, there are numerous references in the medical evidence to the work-related nature of claimant's injury:

(1) The December 13, 2011 note from Abay Neuroscience Center indicates claimant's injury was work-related and occurred on November 23, 2011.[18]

(2) The discharge summary from Via Christi Hospital dated December 1, 2011 indicates that "[t]his is a 52-year old male that was pulling a pallet at work and developed acute onset of low back pain and numbness and weakness to his lower extremities."[19]

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[15] *Id*., Cl. Ex. 5 at 1.

[16] *Id*. at 3.

[17] *Id*. at 1.

[18] *Id*., Cl. Ex. 3 at 1.

[19] *Id*., Cl. Ex. 4 at 7.

(3) The history and physical from Via Christi dated November 28, 2011, indicates "[t]his is a 52-year old male, who was pulling palate [sic] drag at work last Wednesday approximately five days ago and felt a low back pain and then developed numbness and weakness."[20]

(4) The operative report from Via Christi dated November 29, 2011, indicates "[t]his patient is a 52-year old gentleman with acute onset low back pain while he was at work moving a pallet of product from his truck. He noticed a sudden onset of back pain and then progressive leg weakness and numbness as well as urinary retention."[21]

CONCLUSION

This Board member finds that the preponderance of the credible evidence establishes that it is more probably true than not true that claimant suffered personal injury by accident arising out of and in the course of his employment with respondent on November 23, 2011.

WHEREFORE, the undersigned Board Member finds that the February 6, 2012, preliminary hearing Order entered by ALJ Nelsonna Potts Barnes is hereby affirmed in all respects.

IT IS SO ORDERED.

Dated this ____ day of May, 2012.

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HONORABLE GARY R. TERRILL
BOARD MEMBER

c: Kenton D. Wirth, Attorney for Claimant, amie@kslegaleagles.com
Brandon A. Lawson, Attorney for Respondent and its Insurance Carrier, blawson@evans-dixon.com
Nelsonna Potts Barnes, Administrative Law Judge

[20] *Id.*, Cl. Ex. 4 at 9.

[21] *Id.*, Cl. Ex. 4 at 11.